

**ENTERED**

July 19, 2018

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
BROWNSVILLE DIVISION**

**JUAN DELGADILLO,**  
**Plaintiff**

**v.**

**UNITED STATES OF AMERICA, ET AL.,**  
**Defendants**

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**Civil Action No. B-17-59**

**ORDER**

On May 30, 2018, the Defendants filed a motion to dismiss for lack of subject matter jurisdiction, or alternatively, a motion for summary judgment. Dkt. No. 15. As relevant here, the Defendants assert that the FTCA's discretionary function exception applies because they had the discretion to design the spray box that was used to apply the pesticides. Dkt. No. 15, p. 18.

On July 18, 2018, the Plaintiff timely filed a response to the motion to dismiss. Dkt. No. 22. The Defendants have until July 30, 2018, to file a reply brief. Dkt. No. 21.

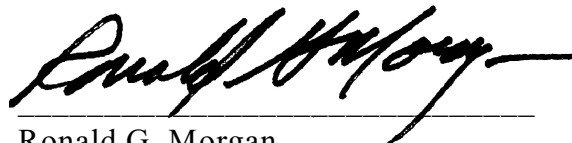
In that reply brief, the Defendants shall address the applicability of 7 U.S.C. § 136j(a)(2)(G) to the discretionary function exception analysis. Federal law states that it is "unlawful for any person . . . to use any registered pesticide in a manner inconsistent with its labeling." 7 U.S.C. § 136j(a)(2)(G). The phrase "to use any registered pesticide in a manner inconsistent with its labeling" is defined as using "any registered pesticide in a manner not permitted by the labeling," with some statutory exceptions listed. 7 U.S.C. § 136(ee). Given that a federal statute generally requires that the pesticides be used in accordance with the labeling instructions, it would appear that the Defendants did not have the authority to ignore the label, unless one of the statutory exceptions applied. Berkovitz by Berkovitz v. U.S., 486 U.S. 531, 536 (1988) (no discretion exists "when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.").

The label for the pesticides in this case instructs the user “do not spray in confined, non-ventilated area.” Dkt. No. 22-1.

In their reply brief, the Defendants shall brief the Court on (1) whether 7 U.S.C. § 136j(a)(2)(G) applies to government employees and agents during a quarantine; (2) to what extent the pesticide label limits their discretion in applying the pesticide; and (3) if the label does limit their discretion, whether this particular label limits their discretion in designing the spray boxes. This order does not limit the Defendant’s freedom in the brief to reply to any other arguments made the Plaintiff.<sup>1</sup>

The Plaintiff may file a sur-reply, only as to the issues identified in this order, no later than August 6, 2018.

DONE at Brownsville, Texas, on July 19, 2018.

A handwritten signature in black ink, appearing to read "Ronald G. Morgan", written over a horizontal line.

Ronald G. Morgan  
United States Magistrate Judge

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<sup>1</sup> The Defendants’ statutory arguments in this case – and any statutory arguments made in the surreply – will be deemed to be equally applicable to the Court’s analysis in Ramirez v. U.S., Civil No. 1-17-60 and Cascabel Cattle Company LLC v. U.S., Civil No. 1-17-61.